No. 10874

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. BOYLE and EDWARD HAFT,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

Brief of Appellee

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Tom Greenfield Inc

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STATEMENT

The appellants seek a reversal of this cause because of claimed error in the entry of the judgment and because of the claimed error of the Court in denying their motion for re-hearing, new trial or review, and have in their brief set out eleven specifications of error. The first nine of the specifications of error charge error on the part of the

Court, committed during the progress of the trial of the cause. The tenth charges the Court erred in entering its decree and the eleventh that the Court erred in overruling the motion of appellants for a rehearing, new trial or review.

The appellants, in their brief, have purported to make a statement of facts. We do not agree that the statement is correct as it relates to the appellants' principal contentions for a reversal. In any event it is not based upon anything found in the record, or properly a part of it. We are precluded from setting out our version of what the facts are, as there is nothing in the record which discloses the actual facts other than the Findings of Fact of the Court, and we thus rest on those Findings of Fact made by the Court as being the actual facts in the case upon which the law questions presented to this Court, if any are presented, are to be solved.

ERRORS 1 TO 9 INCLUSIVE PRESENT NO QUESTION TO THE COURT FOR DECISION.

The record in the case discloses that the appellants have not incorporated in the record any statement of the evidence received by the trial Court, or offered and rejected, and of the proceedings had during the trial of the case. There is nothing properly in the record other than the judgment roll and as Errors 1 to 9 inclusive relate to proceedings had and taken by the trial Court during the progress of the trial of the case, and without such proceedings being made a part of the record, the appellants have precluded the Court from any review.

It is a universal rule that error is never presumed. The burden is on the appellant to establish it.

That this Court is confined to the statement of the evidence for what transpired at the trial, is, of course, settled by it. In

Taylor v. Merrill, 104 Fed. (2d) 710, at 711,

this Court said:

> "Appellant's assignments of error contain what is claimed to be a statement of the objections and their grounds with excerpts of what purports to be the pertinent evidence, but we are confined to the bill in determining what transpired at the trial."

In

United States v. Foster, 123 Fed. (2d) 32 at 34,

this Court said:

> "The appellant has failed to bring before us such a record as would compel an overthrow of the findings made below, and the presumption of correctness which attaches to the findings made by a trial court is sufficient to withstand an attack of the sort here made, upon an obviously incomplete record."

In

Rosenblum v. Anglim, 135 Fed. (2d) 512 at 513,

this Court said:

> "Evidence was received at the trial, but was not made a part of the record on appeal. Therefore the trial court's findings of fact must be accepted by us as correct."

In

Isaacs v. De Hon, 11 Fed. (2d) 943 at 944,

this Court said:

> "It is argued that the findings are not supported by the evidence. The evidence has not been made a part of the record, and we cannot notice this assignment of error."

THE COURT DID NOT ERR IN ENTERING A DECREE AS ASSERTED IN SPECIFICATION OF ERROR NUMBER 10.

In

Bogan v. Hynes, 65 Fed. (2d) 524 at 525,

this Court said:

> "This case was tried without a jury and there is no bill of exceptions or statement of the case in the record. Therefore, the only question involved on this appeal is whether or not the findings support the judgment."

As the situation here is similar, likewise the only question here involved is whether or not the findings support the judgment.

As we read appellants' brief, there is no contention made by them that the findings, if correct, do not support the judgment.

The proceedings were initiated by the government under an existing Act of Congress, viz., Section 3720, Title 26, U. S. C. There are various paragraphs in that Section, two of which relate to the conditions as existed here and under which the libel of information was drawn, and the Section as applicable here is as follows:

> "No. 3720. Seizure of forfeitable property.
>
> (a) Property subject to seizure and forfeiture,
>
> (1) Manufactured articles. All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, and shall be forfeited to the United States.
>
> (3) Equipment. All tools, implements, instru-

ments and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized, and shall be forfeited as aforesaid."

The libel of information alleges that on April 20, 1943, there was seized 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin, at a designated place in Butte, Montana; that the premises on which the seizure was made were used and occupied as a saloon and a place where distilled spirits, upon which an Internal Revenue tax was imposed, were held, intended for sale and sold for beverage purposes, and on the 20th day of April, 1943, the Internal Revenue officers of the United States entered the premises and there found certain distilled spirits in bottles on which a revenue tax was imposed, but had not been paid, and in addition found therein other quantities of distilled spirits in bottles, and that the distilled spirits in bottles found therein at that time, upon which the tax had been imposed and had not been paid were there kept, maintained and had for the purpose of being sold or removed by the owners thereof and the persons operating the business in fraud of the Internal Revenue laws of the United States, or with design to avoid payment of said taxes so levied and assessed upon such spirits, and that by reason thereof such distilled spirits and all other distilled liquors in said place or building became subject to seizure and forfeiture to the United States. The facts alleged in the libel of information bring the case within the Section and authorized not only the seizure of such distilled liquor as was found at that time therein, but likewise all other distilled liquor in the same premises found therein at the time.

United States v. Ryan, 284 U. S. 167.

As we read the statute, the seizure is not dependent upon whether a return is or is not made, or whether a return, if made, is entirely false or only partially false. We find no justification for the conclusion drawn by the appellants that from the language in the libel that the officers found therein and upon said premises certain distilled spirits, in bottles, on which the above named tax was imposed, and upon which said tax had not been paid, to be an allegation that no return was made.Certainly as to the untax paid liquor found on the premises no return was made as to that. However that might be, whether there was or was not untax paid liquor on the premises at the time of the seizure, whether the same was there held in fraud of the revenue of the United States and with intent to be sold in fraud of the revenue of the United States or held or to be sold with design to avoid the payment of the taxes due the United States, and whether the untax paid gin that was seized by the officers on April 20, 1943, was possessed by the appellants on November 1, 1942, were all questions of fact to be established by the evidence and to be resolved by the trial Court in the first instance, and without a statement of the evidence in the record, this Court has nothing to review and thus accepts the findings of fact in that regard as made by the Court as correct.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN DENYING APPELLANTS' MOTION FOR REHEARING, NEW TRIAL OR REVIEW AS CHARGED IN SPECIFICATION OF ERROR NUMBER 11.

The gravamen of the appellants' complaint is that the trial Court refused to grant what they say was a motion for a continuance made 30 minutes after the hour set for the opening of the trial. As the motion, if made, was part of the proceedings had at the trial, and no statement of the evidence, testimony and proceedings was prepared by appellants, apparently the purpose of filing the motion for a new trial, rehearing or review was solely to attempt to make their own record of what transpired at the trial in the form of exparte affidavits of themselves, their employees and their counsel, and the motion for new trial served no other purpose. This we believe an abortive attempt as the record of what transpired at the trial could not be made in such a manner. The so-called motion commences at page 69 of the record and claims irregularities in the proceedings of the Court had at the trial in different particulars.

The record discloses that on December 13, 1943, the Court set the trial of this case for December 21st at 10:00 o'clock, that notices were given and that the appellants' attorney received the notice on December 14th (R. 35); that between those dates no motion for any continuance of the cause or for a vacating of the setting was filed. Counsel for appellants concedes those things, but contends that an offer in compromise was made and accepted

and that such being the case he felt that the matter was concluded; that he did not notify his clients of the setting of the case, did not prepare for trial and did not appear for trial at 10:00 o'clock on the day the trial was called. He further says he thought the office of the United States Attorney would join him in moving for a vacation of the setting of the trial or a continuance of its date, or that a motion for dismissal of the action would be made by the appellee. He is not exactly certain which state of facts he assumes and includes the first in Paragraph 1 (a) of his motion and the other in Paragraph 4. He did not subpoena either of his clients as witnesses or make any effort to have them at the trial. The minutes of the Court disclose (R. 32) that when the counsel finally appeared in court, he stated to the Court "that an offer in compromise has been made and he did not think that the case would be tried until the offer had been disposed of, and now moved the Court to continue the trial of this case until next Monday morning at 10:00 o'clock." The Court stated the motion for a continuance should be made in writing and noticed for hearing. The Court, of course, was correct in this, as that was the proper procedure and the counsel had all of the facts within his knowledge on the 14th of December, when he received the notice of the setting of the case for trial that he had on the 21st.

From the denial of that motion the appellants assert the Court denied the right of the United States Attorney and the Bureau of Internal Revenue authorities to compromise the case without the consent of the Court. Of course, the Court made no such denial. The right of anybody to compromise the case was not an issue in the case, was

not considered by the Court and not determined by the Court.

If the Court had denied the right of the officials of the Internal Revenue Department or of the United States Attorney to compromise the case, the Court would have been doing nothing except correctly stating the law, as neither had any such right. Section 3761, Title 26, U. S. C., cited by the appellants, did not give the Internal Revenue officials any power to compromise this case. It does give to the Commissioner, with the approval of certain designated officials, the power to compromise any civil or criminal case arising under the Internal Revenue laws prior to its reference to the Department of Justice, and specifically vests in the Attorney General the sole power to compromise after such reference. Under no circumstances has the United States Attorney authority to compromise a case. All litigation in which the United States is a party is in the hands of the Attorney General and he, and he alone, has such authority.

> U. S. v. Hon. Pierson M. Hall, Judge, etc. (C. C. A. 9th, decided Nov. 25, 1944).

Apparently the position taken now by the appellants is that an offer of compromise, which has been submitted to the Attorney General and has not been accepted, deprives the Court of jurisdiction to try the case until it is accepted or rejected. Appellants cite no authority to that effect. It is not the law so far as we know. It was most certainly not the theory of counsel for the appellants at the time he made the motion, because he simply moved that the Court continue the trial of the case until the following Monday. It was certainly not known by him whether the

offer in compromise would be passed on by that time or not, and he apparently thought the Court would have jurisdiction to try the case at that time whether it was or was not passed on.

It is significant to note from the record that the only ground set out by counsel for his continuance was that he thought the case should not be tried until the offer in compromise was disposed of. He did not at that time inform the Court he thought the case had been compromised, that he thought the appellee would dismiss the case as it was disposed of, or would unite with him in requesting a motion for a continuance or that he was not prepared to go to trial, or did not have the necessary witnesses present, or for any of the other reasons that he sets forth in his brief. These were all manufactured out of whole cloth as an afterthought and simply for the purpose of attempting to make a record by ex parte affidavits to put the Court in error. There was filed the counteraffidavit of Assistant United States Attorney Brown (R. 94), the attorney who commenced the case, who was in exclusive charge of it at all times to the knowledge of appellants' counsel, who tried it and personally appeared at all of the proceedings had from its commencement to the time of the denial of the motion for new trial, wherein it is set out that the day after the setting of the cause for trial, appellants' counsel discussed the question of a continuance of the trial with the affiant, the counsel in the case representing appellee, and that such counsel advised appellants' counsel that if appellants' counsel desired a continuance of the cause, he, appellee's counsel, would accompany him, the appellants' counsel, to the Court, would inform the Court

of the status of the compromise and would not oppose any motion for a continuance that counsel desired to make, and the affiant further informed the appellants' counsel that if he, such counsel, did not do that the case would be tried at the date set. It is further set out that appellants' counsel never came to the affiant's office, never requested him to accompany appellants' counsel to the Court at any time after the conversation. The statements made in the affidavit are in no wise challenged, impeached or contradicted.

In view of that condition it is inconceivable for us to understand how appellants' counsel can expect to impress anyone with the truth of his statement that he did not think the case would be tried on the day it was set. It is certain that he did not find the trial Court that gullible. However, this is his burden. The first irregularity he sets out is that the United States Attorney, as attorney for the libelant, did not join with him in the moving for a vacation of the setting of the cause for trial or a continuance of its date. The question naturally occurs is "Just when did he expect to move for a vacation or a continuance of the date so that the United States Attorney could join with him?" He certainly did not make the motion between the 14th of December, the date of his conversation with the Assistant in charge of the case and the 21st of December, the date set for the trial. He was not present in court at 10:00 o'clock, the hour set for the trial, to make the motion so that the United States Attorney could join with him in it if he did make it, and his contention there is an absurdity on the face of it.

The allegation that the appellants and appellee had pre-

viously agreed upon a settlement and compromise of the action is established to be not true by the affidavit of the appellants' counsel, for it clearly appears from that affidavit that the offer in compromise was made, was sent in to the Attorney General, was rejected by the Attorney General and that an Assistant United States Attorney, without authority either from the Attorney General or the intervenors, sent the offer back to the Attorney General (R. 80). Certainly after having knowledge that the Attorney General had rejected the compromise, there was small basis for hope that he would reverse his position.

The authorities cited by appellants in their brief, as to the effect of a compromise actually made by authorized officers of the government, are not in point—first, because in those cases the officers purporting to make the compromise actually had the authority to do so under the law, and second, because the fact situation here is different from those cases. There is nothing in the record here which establishes that the compromise was made at the solicitation of any officer of the government, that any promise of immunity was given, or that any money was paid to the government and retained by it. In any litigation in which the government is a party, a litigant has the right, if he desires, to make an offer in compromise, has the right, if he desires, to accompany the offer by a draft or check for a sum of money and mail it to the Attorney General. His act in so doing does not effectuate the compromise. The Attorney General has a right to either accept or reject it. The appellants exercised this right. They did send a draft in for $446.26, 50% of the value of the liquor, but the inference that appellants attempt to leave, that the money

was retained by the government, is not true, as upon the rejection of the offer the draft was redelivered to the appellant and they have the money.

The affidavits as filed by the appellants and on their behalf, allegedly in support of a new trial, going into such detail as to the proceedings had at the trial, setting out testimony in detail that would have been offered had witnesses been subpoenaed make it manifest that they were filed solely to make a record of what transpired at the trial of the case. Had it been contended that the witnesses and the testimony they would have given were newly discovered, it would no doubt have been proper to have filed such affidavits. However, no such contention is made.

It is, of course, necessary, in requesting a continuance because of inability of the party to procure a witness, to make a timely motion and set out in the form of affidavits the testimony that it is expected the witness would give, together with facts showing diligence in attempting to procure the testimony and in making the application.

Engelstad v. Dufresne, 116 Fed. 582;
Copper River Mining Co. v. McClellan, et al., 138 Fed. 333;
Alaska Anthracite R. Co. v. Moller, 257 Fed. 511.

All of the above are from this Court.

However, the appellants did not follow this procedure in moving for a continuance. Apparently a like attempt to amplify a record was before the Circuit Court of Appeals of the Fifth Circuit in

City of Coral Gables v. Hayes, 74 Fed. (2d) 989 at 990:

"There is no bill of exceptions. We do not know what happened when the date for trial was fixed, or

> that any objection was made. There are some recitals about it in the motion for continuance later filed, but they are uncertified by the judge. The same trouble exists touching the ruling on the motion for continuance. The motion and order on it, which recites an exception taken, are certified here as parts of the record. If we consider them as a sufficient substitute for a bill of exceptions, we find no abuse of discretion shown. Only one witness was alleged to exist, and no effort to secure his presence or his deposition appeared. If present, his testimony would have done no good."

However, the trial Court, in considering the motion, was not limited to the recitals contained in the affidavits of the appellants, their employees and their counsel and was not compelled to accept as facts the conclusions set out in those affidavits as to claimed contentions and beliefs. The Court had before it and could properly consider the counter- affidavit of the Assistant United States Attorney, who handled the case from its inception and who was conversant with all of the facts, and equally had before it and could consider all of the testimony given at the trial of the case and all of the proceedings had at the trial, and whether the motions, that it is claimed in the affidavits were made at the trial upon the grounds and for the reasons therein set out, were actually so made at the trial, and were upon those grounds. In that respect the Court could consider and did consider the truth of the recitals in the affidavits as to the proceedings had at the trial of the case. The Court likewise, in considering the contention made by the appellant Haft, of his actually inventorying the 13 pints and 1 quart of gin, containing 1.50 proof gallons, upon which a tax of $3.00 was due, and

the statements contained in the affidavit as to the bona fides of the employee of Haft, the accountant, in changing that inventory to reflect a different brand name and a different proof, with all of the evidence in the case, could consider in that regard the evidence establishing the great quantity of distilled liquor that was not returned to the Internal Revenue authorities and which was disposed of between the first day of November when the tax was due and the 20th of the following April when the officers entered the premises. A portion of this quantity is set out in the affidavit of Haft himself at page 90 of the record, where he recites that although he inventoried 16 cases of Barclay whiskey, it was overlooked by the accountant and no return was made of it. That 16 cases amounted to 48 gallons, and as there is no testimony in the record, the Court is precluded from learning the additional large quantity that was likewise not returned. However, the trial Court knew what the evidence was in that regard and the trial Court knew that the government was not going into this place of business and seize its entire stock of goods solely because 1.50 proof gallons of distilled spirits, upon which a tax of $3.00 was due, was omitted from the return made, and the appellants and their counsel know that to be the fact, irrespective of their contrary statement in their brief.

This Court in

Bateman v. Donovan, 131 Fed. (2d) 759 at 764,

said:

> "It is so well established as not to require citation of authority that the order denying a new trial is discretionary with the trial court and may be reviewed only for a clear abuse of authority. So in this con-

> nection the matter for our determination is whether the matter set forth in the juror's affidavit was such as to compel the granting of a new trial and whether there was an abuse of discretion in its denial."

We respectfully submit that there was nothing before the trial Court that compelled it to grant a new trial and that no abuse of the trial court's discretion or misuse of its power in that respect was established.

As it appears from the record, the appellants' counsel knew the case was set for trial and knew that if he did not get a continuance it would be tried. If he had any legal grounds for continuance on the day of the trial, they were all in existence and within his knowledge at the time he received the notice and he had full and ample opportunity to make the proper motion coupled with the proper showing. If he desires to adopt the practice of not notifying his clients when cases are set for trial, that is a matter between himself and his clients. The practice is of such hazard that counsel generally do not adopt it, and certainly his practice in that regard furnishes no grounds for a continuance. If the record discloses anything here, it discloses complete and utter indifference and disregard of the actions of the Court in setting a case for trial; for him to adopt that attitude of indifference and disregard of the Court and of its convenience, and permit the Court to allocate its time and hold itself in readiness to perform its official duty as Judge at the time set, and allocating the time of the attaches of the Court in attendance upon it, and permit the adversary to go to the expense of subpoenaing his witnesses, preparing for trial and attending at the time set for trial, and then hope to contend with

success that because of his complete neglect, indifference and disregard, all of those things done by all of the others are in vain, requires a degree of self-assurance which is rarely encountered.

One power that the Court does not have is the power to compel a party litigant to appear in court at the time set for trial and participate in it. A litigant has a right not to appear if he does not desire to appear, but by so doing he cannot prevent the other person from having his day in Court. From the record in this case, their is absolutely no more assurance that the appellants would appear at a second trial if a reversal were had than they did at the first trial.

APPELLANTS COMPLAIN AT THE REFUSAL OF THE COURT TO REQUIRE APPELLEE TO PRODUCE LIQUOR IN THE COURT, TO PRODUCE RECORDS AND TO PERMIT THE WITNESS McGARRY TO FURTHER REMAIN ON THE WITNESS STAND.

A substantial portion of appellants' brief is addressed to these questions. They are not before this Court as no transcript of the testimony or proceedings had at the trial is incorporated in the record, and would not be commented upon except for certain statements made in appellants' brief.

At page 28 the appellants contend it was the contention of the intervenors that the bottles themselves would have disclosed stamps or other evidences of payment of taxes. We do not know when appellants adopted that contention. The payment of the floor stocks tax was not evidenced

by any stamp put on the bottles themselves. Upon interrogation by the Court, during the progress of the trial, counsel conceded such to be the fact and informed the Court that none of the bottles had any stamp on them evidencing the payment of this floor stocks tax.

With reference to the production of the books and papers, which appellants complain of, they, of course, had ample opportunity to make a demand therefor, or to issue a subpoena duces tecum to the custodian and they did neither. However, there was certain interrogation by the Court to counsel as to the purpose of the production and what he desired to prove thereby and answers made to those interrogations by counsel, none of which, of course, appear in this record and which further furnished a basis for the ruling of the Court.

With reference to the witness McGarry, had a record been produced with the remarks of the Court in it, as well as counsel, the reason for the action of the Court would have been apparent. Even on this record, the query naturally arises whether the demand for the production of all of the records and the insistence upon maintaining the witness McGarry on the stand by counsel was not in furtherance of his defiance of the Court and threat made to the Court to stall the case through the afternoon for the purpose of securing the attendance of another witness who was not subpoenaed and not present (R. 35).

CONCLUSION.

Appellants characterize the result as a miscarriage of justice and said that it was brought about by the denial of

the trial Court of the power to compromise, created by Section 3761 of Title 26, U. S. C.

We see no justification in the record for either of the statements and there is no reason to believe that the same result would not be reached, irrespective of the number of trials had.

We feel the case was prolonged and the appeal had because of the action of the Assistant United States Attorney in charge of the case in requesting the Court for a short recess to permit him to communicate with the counsel for the appellants when he did not appear in Court at 10:00 o'clock when the case was called for trial. This action was taken because of the practice of the United States Attorney of not entering a default in a case in which an appearance has been made, without communicating with the opposing counsel for the purpose of determining whether or not the counsel had suddenly become ill, or because of circumstances beyond his control had been prevented from appearing in court or notifying the United States Attorney's office or the Court that he was unable to appear. This practice of the United States Attorney has been general. The instances in which it has not been appreciated by opposing counsel, but on the contrary they have attempted to take advantage of it, have been so rare as not to convince the United States Attorney that the practice is bad and should be stopped, but only in the future to be exceedingly careful in his dealings with those who have so attempted.

We respectfully submit that the record discloses nothing insofar as appellants are concerned except negligence and a complete, unwarranted and inexcusable inattention

to their interests and it could not reasonably be expected that any court would give more attention to their interest than they themselves gave; that no matter what effect their indifference and neglect might have upon their interest, certainly they cannot use it for the purpose of penalizing the other party to the litigation, who was neither neglectful or indifferent to the Court or to its own interests; that the trial Court in all of the proceedings had scrupulously followed the law as it is written; that the decree entered is proper and just and that the case should be affirmed.

Respectfully submitted,

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